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Supreme Court, U.S.
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No. 92-990

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

GARNER GREGORY, ADMINISTRATOR OF THE ESTATE OF JOE EDWIN GREGORY; BEATE GREGORY, individually and as mother and next friend of JOE RAY GREGORY; and DONNA MAE FIELDS, Petitioners,

v.

THE CITY OF ROGERS, ARKANSAS; PTL. RONNIE HOWELL, individually and in his capacity as a police officer of the City of Rogers, Arkansas; and IMPERIAL CASUALTY AND INDEMNITY CO., Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondents' Brief in Opposition is really a brief on the merits. Even as such, Respondents' brief demonstrates the seriousness of the Questions Presented and the stark reality that these questions *and* many of Respondents'

rhetorical "pandora's box of subissues," *see* Brief in Opposition at 9-13, should be answered by this Court.

The District Court's Order and bench ruling dismissing this case are unreasoned and include no findings of fact. The District Court was reversed by the unanimous Eighth Circuit Panel, which in turn was reversed by the six judge ***en banc*** majority. The six to five (actually six, counting Judge Timbers) division of the Eighth Circuit, sitting ***en banc***, itself demonstrates confusion among the lower federal courts as to the correct answers to the issues in this case.

Respondents' flawed analysis and misunderstanding of Section 1983 and constitutional rights jurisprudence further demonstrate the importance of these issues. Indeed, Respondents themselves correctly recognize that in this case, this Court should clarify the "constitutional duty of care" owed by state actors under the Due Process clause of the Fourteenth Amendment, to a private person's interest in personal security. Brief in Opposition at 9.

This concession involves the Second and Third questions presented in the Petition. On the basis of the concession alone, plenary review is appropriate. Similarly, this Court should grant plenary review of the questions presented to which Respondents made no response, *i.e.*, the First (summary judgment standards) and Fourth (municipal liability in absence of individual actor liability) questions. All four Questions Presented are interrelated.

I.

THIS COURT SHOULD CLARIFY THE DUE PROCESS STANDARD(S) OF CARE THAT STATE ACTORS OWE TO PRIVATE PERSONS WHO ARE NOT TAKEN INTO CUSTODY AND WHO ARE NOT GOVERNMENT EMPLOYEES, WHEN THE STATE ACTORS HAVE TAKEN AFFIRMATIVE ACTIONS THAT INCREASE THE RISK TO SUCH PRIVATE PERSONS' PERSONAL SECURITY.

Disregarding this Court's decision in *Collins v. City of Harker Heights*, 503 U.S. ___, 117 L. Ed. 2d 261 (1992), Respondents incorrectly argue that "This Case Does Not Merit Certiorari Because It Does Not Involve An Abuse Of Governmental Power Sufficient To Invoke The Protections Of The Due Process Clause Or § 1983." Brief in Opposition at 6. As *Collins* instructs, a Section 1983 plaintiff must allege and prove only that a "person," acting under color of state law, "caused" injury to the plaintiff through a violation of the federal Constitution or laws. *See* 117 L. Ed. 2d at 269-70. Abuse of governmental power is *not* a separate element of a Section 1983 claim. *Id.*

Respondents rely largely on *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). That case teaches only that the injury to a Section 1983 plaintiff must be "caused" by an "affirmative" act performed by the state actor, rather than by the act of a private person. The state's mere failure to act ordinarily is insufficient to engage due process protections. *Compare* Brief in Opposition at 6-8.

In *Deshaney*, however, this Court did not address the issue whether the state proximately causes injury to a private person's federal rights where the state actor affirmatively places that person in a position of danger the person would not otherwise have faced. *See* 489 U.S. at 201 n.9. Petition at 14-16. Respondents incorrectly argue that there is no conflict among the Circuits *as to the circumstances in which* such conduct by state actors constitutes a violation of a due process right to personal security, of a private person. *Compare* Petition at 14-16 *with* Brief in Opposition at 13-15.

Most significantly, the parties agree that this Court has not yet decided what substantive due process standard of care government actors owe a private person, who is not in government custody or employment, and who is injured because the government actor has placed the person in a position of physical danger. "Respondents concede that the constitutional duty of care does need clarification in this Court since this issue was left open in *Deshaney*, *supra*, at 202 n.10 and *Daniels* [*v. Williams*, 474 U.S. 327] at 334 n.3 [(1986)]." Brief in Opposition at 9. *Accord* Petition at 17-19.

Respondents argue that the standard should be "deliberate indifference." *See* Brief in Opposition at 9. That may well be correct; but it is by no means certain. The correct standard could be "recklessness" or "gross negligence." *See Daniels v. Williams*, 474 U.S. at 334 n.3; *see also Whitley v. Albers*, 475 U.S. 312, 327 (1986). It could even be "reasonableness," in some circumstances. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

To properly address these issues, the Court should grant the Petition for Writ of Certiorari, and the case should be set for full briefing and oral argument.

II.

THE COURT SHOULD GRANT PLENARY REVIEW OF WHETHER A MUNICIPALITY MAY BE LIABLE UNDER SECTION 1983 FOR VIOLATING A PERSON'S FEDERAL RIGHTS WHEN NO AGENT OF THE MUNICIPALITY HAS ALSO VIOLATED THAT PERSON'S FEDERAL RIGHTS, AS WELL AS WHETHER ARKANSAS' MANDATORY DUTY CIVIL DETENTION STATUTE REQUIRING PEACE OFFICERS TO DETAIN PUBLICLY INTOXICATED PERSONS CREATES A DUE PROCESS LIBERTY INTEREST.

Respondents misunderstand the significance in this case of Ark. Code Ann. Section 12-11-110(a), a civil law provision, that places a mandatory duty on "all peace officers to arrest any insane or drunk person whom they shall find at large and not in the care of some discrete person, and take him before some magistrate . . . [for civil detention or other such protective action]." Petition at A-48 to A-49. *Compare* Brief in Opposition at 10-11, *with* Petition at 22-23.

First, Respondents' reliance on the more relaxed or discretionary terms of Ark. Code Ann. Section 5-71-212(a), the 1975 version of the Arkansas *Criminal* Code is inappropriate. Appendix hereto at A-1. *See* Brief in

Opposition at 10-11. That statute identifies elements for which a person is to be *arrested*, charged and convicted of a crime. It does not control or limit the mandatory civil detention requirements of Ark. Code Ann. Section 12-11-110(a).

Second, the *Deshaney* Court specifically declined to consider whether a mandatory duty type statute, such as Section 12-11-110(a) creates a constitutionally protected liberty interest because the issue was raised for the first time on appeal to this Court. 489 U.S. at 195 n.2. *See also Collins*, 117 L. Ed. 2d at 275-76, where the Court only assumed the existence of a "liberty" interest. This issue was raised below in this case, and is fairly included in the scope of Questions Presented and the Petition. *See* Petition at 20-24. Hence, the case at bar presents an appropriate occasion for the Court to determine the effect of the violation of a mandatory duty statute in the context of a Section 1983 action.

Third, Respondent Howell's failure to enforce the mandatory civil detention provision may well have a bearing on his liability under Section 1983. To implicate Howell in a constitutional violation on this ground, Petitioners may have to prove that he knew or should have known that Decedent and Petitioner Fields were intoxicated and Howell ignored that fact to avoid the paperwork or other inconvenience of enforcing the state mandatory duty statute. *Cf. Collins*, 117 L. Ed. 2d at 273. Perhaps all the Petitioners may have to prove is that Howell acted recklessly, with gross negligence or with deliberate indifference. *See Daniels v. Williams*, 474 U.S. at 334 n.3. That is for this Court to decide.

Fourth, more to point, Petitioners have alleged, and are prepared to prove, that Respondent City of Rogers proximately "caused" Petitioner's injuries, through its policy and custom of inadequate training and supervision of its peace officers, including Respondent Howell. This policy and custom included the City's condoning such peace officers' disregard of their mandatory obligations to detain (as opposed to arrest) publicly intoxicated persons. *See* Ark. Code Ann. Section 12-11-110(a).

Respondents now virtually concede the existence of the alleged policy or custom. *See* Brief in Opposition at 11. If such a policy or custom exists, and was at play in this case, Petitioners will have established the substitute for *respondeat superior* that is necessary to hold the City of Rogers liable. *See Collins*, 117 L. Ed. 2d at 272-73. Petitioners anticipate no difficulty in proving that through implementation of these policies or customs the City of Rogers' was deliberately indifferent to the federal rights of persons, such as Decedent and Petitioner Fields, with whom its peace officers were likely to come into contact. *See City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989).

Assuming Petitioners' proof, Respondents do not deny that this case presents an important unresolved issue on which there is a conflict among the Circuits, namely, whether the municipality itself may be liable under Section 1983 even if it turns out that Respondent Howell is not liable. *See* Petition at 20-24.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for Writ of Certiorari, the Petition for Writ of

Certiorari should be granted and the case should be scheduled for plenary briefing and argument.

Dated: February 12, 1993

Respectfully submitted

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Petitioners